UPREME COURT

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No. 1356

HARRY SUGARMAN,
Petitioner,

vs.

JACK B. FORBRAGD, et al.,
Respondents.

PETITIONER'S BRIEF IN REPLY TO MEMORANDUM WITH RESPECT TO MOOTNESS

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An individual dealing with his government is supremely interested in the procedural safeguards instituted by Congress when it enacted the Administrative Procedure Act (APA). Agency determinations regarding imports, no less than determinations on any other matter, can have such important consequences for the citizen involved that he looks to the APA as his fundamental guarantee of just action.

Three years ago the petitioner and his associates purchased damaged coffee for a nominal amount and then spent over $26,000 (excluding legal fees) to re-

condition it to meet acceptable commercial standards. The substantive question, whether the reconditioned beans were fit for food, was never determined either at the administrative hearing [see Memo. Appendix A (II R. 52-53)] or by judicial review [see Memo. Appendix B (II R. 74)]. Instead the coffee was barred from import for use as blended coffee on the basis that the FDA had the power to do so in its exercise of absolute discretion. During the years of litigation, the petitioner was faced with the expense of storing the perishable commodity; economic pressure finally forced him to sell and re-export the beans. Thus it is true that whether the coffee beans were fit for food is no longer pertinent. However, the issue of the plaintiff's rights regarding procedures is not moot, rather the courts below have removed these rights.

As the matter presently stands, the presence of three words, "If it appears", in 21 U.S.C. 381 constitutes justification for denial of the safeguards of the APA. Thus a dangerous precedent has been set for taking away rights intended to provide fair administrative hearings and judicial review. The government in its reply brief contends that there is no "concrete likelihood that the instant judgment will be used against him in a pending or subsequent procedure". The facts are that the government has already cited this case in *Carl Borcheninus Co., Inc. v. John W. Gardner, et al.* (E.D. La., 1968) 282 F. Supp. 396, *400,* in support of the proposition that a coffee importer has no right of judicial review if the

administrative agency has exercised discretionary authority under 21 U.S.C. 381. The likelihood that the government will use this precedent in ways detrimental to the petitioner and his fellow importers can be readily inferred from the following exchange between the government attorney and the District Court in this case (II R. 72-74):

> "The Court: All right, gentlemen, why shouldn't I send this case back to the Food and Drug Administration?
>
> Mr. Ensign: Well, because, Your Honor, the Court doesn't have the power to conduct a judicial review.
>
> The Court: Why not?
>
> Mr. Ensign: Because this is a case where the agency action is committed to the agency discretion.
>
> The Court: It says, 'if it appears from the examination . . .' What does that mean?
>
> Mr. Ensign: It means that if in the opinion of the Food and Drug Administration, from the examination or otherwise, the article is not fit for food . . .
>
> The Court: How does he exercise that discretion, don't bother me, that stuff burned on the ship, appears to me that's no good, that's the end of it, I don't want to hear any more. I have made my ruling. I have exercised my discretion. You mean to tell me the Food and Drug can go that far, even under import theory?
>
> Mr. Ensign: Might act beyond the statutory authority, in which case no court would be deprived of the power to conduct a judicial review.
>
> The Court: How do I determine whether he acted beyond his statutory authority?

Mr. Ensign: Well, the complaining party has the right to——

The Court: He has, he's coming here and he says, you've held all the cards up to your chest. You haven't shown me a single card. Now, that's not the exercise of discretion that's contemplated here, when it says 'appears,' has to appear not only to—in a sense to—while the statute makes discretionary—administrative officer, and has to appear to him, but that appearance to him has to be a reasonable appearance, and somebody's got a right to examine to see whether it's a reasonable appearance.

Mr. Ensign: So long as he acts within his statutory authority, our position is that the Court has no power for judicial review, and so long, of course, as the statute is constitutional as it is."

Incidentally, we regret that the line of questioning did not return and require the government to answer the Court's inquiry, "How do I determine whether he acted beyond his statutory authority?" in light of the government's claim that it does not have to establish a reviewable record as to the basis of its actions.

Kenneth Culp Davis, Professor of Law at the University of Chicago, has made pertinent commentary on the present issue in his Administrative Law Treatise, 1965, Pocket Part Section 28.16, pages 27-28.

"Is it good government—is it sound law—that permits a single individual to determine issues of law, fact, and discretion affecting the property rights of finance companies, without hearings, without review, without disclosure of the rules that are used to guide discretion, and without

opening to public inspection the resulting case law?

> "A reviewing court, without at any point substituting judgment, could (a) determine the reasonableness of the rules developed by the administrator as a guide to discretion, (b) require that those rules be open to public inspection, (c) ascertain whether the particular exercise of discretion arbitrarily departs from the administrative case law, (d) require that the administrative case law be open to public inspection in compliance with § 3(b) of the Administrative Procedure Act, (e) require findings of fact and a statement of reasons, (f) determine whether the findings are supported by substantial evidence, (g) determine whether the stated reasons are based upon considerations which are reasonable and legal."

The plaintiff most heartily recommends this view of Professor Davis to the Court in asking that the substantive issue of the fitness of the coffee beans, now moot, be dismissed, and the judgment undermining the effectiveness of the APA be either reviewed or vacated as in *Mechling Barge Lines v. U.S.*, 368 U.S. 324, and *U.S. v. Munsingwear,* 340 U.S. 36. The decision as it stands threatens to remove even the judicial relief afforded in import determinations antedating the passage of the APA [*Ambruster v. Mellon* (D.C. Cir. 1930) 41 F. 2d 430, and *Bowman v. Retzlaff* (D. Md. 1946) 65 F. Supp. 265].

CONCLUSION

In conclusion, the plaintiff's primary petition is for a writ of certiorari. If, however, the writ is not granted and this action is dismissed because of mootness, it is respectfully requested that the judgment below be vacated.

Dated, San Francisco, California,
June 11, 1969.

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